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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 473

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA and ASSOCIATED MUSICIANS OF GREATER NEW YORK LOCAL 802, *Petitioners,*

v.

BEN CUTLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY KAISER
EUGENE GRESSMAN
GEORGE KAUFMANN
RONALD ROSENBERG
1730 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioners

Of Counsel:

EMANUEL DANNETT
DAVID I. ASHE
JEROME H. ADLER

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v.

BEN CUTLER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners American Federation of Musicians of the United States and Canada (AFL-CIO) and its Local 802, Associated Musicians of Greater New York, pray that a writ of certiorari issue to review the judgment

of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 30, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 316 F. 2d 546 and is reprinted in Appendix A, pp. 1a-7a, *infra*. The opinion of the District Court for the Southern District of New York is reported at 211 F. Supp. 433 and is reprinted in Appendix B, pp. 7a-35a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 1963. A timely petition for rehearing was denied on May 17, 1963. By order of Mr. Justice Harlan, the time for filing this petition for a writ of certiorari was extended to and including September 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. May a federal appellate court affirm an injunction grounded on a violation of a criminal statute by substituting its own factual assumptions for the uncontested findings of the trial court?

2. Does Section 302 of the Labor-Management Relations Act of 1947, as amended, render criminal the fulfillment by union members of obligations imposed on them solely as members?

3. Is the test for determining whether a person is an employer for purposes of the Labor-Management

Relations Act, as amended, the right of control as established by the contract of the parties?

4. Does the federal commerce power extend to the performance of single musical engagements at weddings, dances, and confirmations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves §§ 2(3) and 302 of the Labor-Management Relations Act of 1947 as amended, 61 Stat. 136, *et seq.*, 29 U.S.C. 141 *et seq.*, and Art. I, § 8, cl. 3, and the First Amendment of the United States Constitution. These are reprinted in pertinent part in Appendix C, p. 36a, *infra*.

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner American Federation of Musicians (hereafter AFM), is an international labor organization with a membership of approximately 260,000 professional musicians in the United States and Canada. Petitioner Local 802 is an affiliate of AFM with jurisdiction over the five boroughs of New York City and Nassau and Suffolk Counties. The present suit was brought by Respondent Ben Cutler, a professional musician and member of Local 802 and AFM, to enjoin the enforcement of union regulations requiring all members when performing as leaders to collect and transmit these unions' work taxes on the ground that such conduct violates § 302 of the Labor-Management Relations Act of 1947 as amended, 29 U.S.C. § 186 (hereafter referred to as "the Act").

This case involves "single engagements." A "single engagement" is "a musical performance generally for

one night but always less than one week" on such social occasions as weddings, confirmations, fraternity dances, etc. (R. 193b).[1] Normally, the purchaser of the music (the father of the bride, organizational social chairman, etc.) contacts a musician and tells him that he desires a specified number of instrumentalists for a particular time and place. This musician (the "leader") then obtains other musicians ("sidemen") to perform the engagement with him. Every leader is an instrumentalist and, generally, the leader performs on an instrument when leading.

The nature of employment for single engagements is highly casual. The musicians playing a particular engagement will often never play together again. The same musician may be a leader one night and a sideman the next. Local 802 maintains an exchange floor where members frequently exchange engagements so that a leader who engages a member for one engagement becomes himself the sideman for the same member whom he had engaged as a sideman for the prior engagement. Some musicians, (a small fraction of the total number who perform as leaders) who are more

[1] The record in this case, by stipulation of the parties (R. 187b-188b), is based on the pleadings herein, the testimony in a related case, *Carroll* v. *AFM*, and testimony taken in connection with the motion for preliminary injunction in the present case. The *Carroll* complaint was dismissed on the ground that plaintiffs were not members of the defendant unions, and hence not subject to the union regulations they challenged. 206 F. Supp. 478 (S.D.N.Y.). The Court of Appeals affirmed that decision on the same day that it decided the present case. 316 F. 2d 574. The two volumes (gray and white-covered) constituting the record appendix in *Carroll* v. *AFM*, Nos. 27769-72 in the court below, are being filed with the Clerk.

But, unless otherwise indicated, "R." refers herein to the blue-covered record appendix of the instant case in the court below.

successful than others in obtaining engagements, devote their full time to being orchestra leaders. They have their own offices, engage in advertising, and call the performing group by their own name. Respondent Cutler is one of these. He performs on an instrument when he leads.

The Federation prescribes a form agreement for the employment of its members. This contract, known as the Form B Agreement, provides that the purchaser of the music shall be the employer of the musicians and states that he "shall at all times have complete control over the services of employees under this contract * * *". The amount of wages which the purchaser of the music must pay for the services of the musicians is set forth in the contract, subject to minimums established by the local in whose jurisdiction the engagement is to be played.

II. PROCEEDINGS IN THE COURTS BELOW

A. The District Court

On July 23, 1962, respondent Cutler and certain other musicians brought this suit in the United States District Court for the Southern District of New York to enjoin the enforcement of certain provisions of the By-laws of the AFM and Local 802 respecting work taxes.[2] These By-laws may be described briefly.

Article 15 of the AFM By-laws require (with some exceptions not here relevant) every member perform-

[2] Following the decision below, the AFM and Local 802 amended their respective by-laws to eliminate these work taxes, effective January 1, 1964. Many of the AFM's other locals retain their work taxes, some of which are the subject of pending or threatened litigation. In any event, the cessation of a course of action out of respect for a judicial decree does not render moot an appeal from such decree. See *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 42-43; *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632.

ing outside the jurisdiction of his home local to pay a work tax to the AFM amounting to 10% of the minimum scale that the local in whose jurisdiction the engagement takes place has established for its own members. The AFM By-laws also provide that traveling musicians be paid (by the purchaser of the music) at least 10% more than the minimum wages established for that local's members.

The By-laws of Local 802, as well as those of many other locals, require every member of the local working within its jurisdiction to pay a work tax to the local. The current Local 802 tax is 1½% of the scale.

The complaint did not challenge the right of the defendants to assess these work taxes. It attacked only the method of collection. The leader, upon receipt of payment from the purchaser of the music, transmits the taxes imposed on all members to the union. The gravamen of the complaint was that leaders who are employers are forbidden by § 302 of the Act so to do. It alleged that the performance of single musical engagements is an "industry affecting commerce," that each plaintiff leader is an "employer," and that the transmission of the taxes to the union is therefore an employer payment to the representative of his employees prohibited by § 302. The unions urged that respondent's activities were not within the federal commerce power, that the purchaser of the music rather than the leader is the employer and that in any event § 302 is not applicable to these transactions because they are solely membership obligations having no relationship to the employer status of the leader.

The District Court (Levet, J.) found that respondent Cutler was engaged in interstate commerce, rely-

ing on a finding that "Cutler fulfills engagements outside the State of New York, in which he usually operates and in which his principal office is located" (Finding No. 8, App. B, p. 13a, *infra*), and on numerous provisions of the unions' by-laws which, he found, demonstrate "that defendant unions represent members both leaders and sidemen in the single engagement field whose engagements require a constant continuous stream of commerce between the states of the United States." (Finding No. 7, App. B, p. 13a, *infra*).

Judge Levet further concluded that the leader rather than the purchaser of the music is the employer, citing *Carroll* v. *AFM*, 295 F. 2d 484 (C.A. 2),[3] and his factual findings of the indicia of Cutler's employer status. He did not discuss the applicability of the Form B Contract.

With respect to the unions' defense that § 302 is in any event inapplicable as a matter of law, the court said simply, "Section 186 [of the U.S. Code, § 302 of the Act] applies to these payments and since they do not comply with the exceptions in 186(c), they are unlawful" (App. B, p. 31a, *infra*). The District Court thereupon issued an order enjoining defendants from enforcing the 1½% tax and the 10% tax against respondent when acting as an employer in the single engagement field (R. 219b-225b).

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[3] That decision in turn had relied on *Cutler* v. *United States*, 180 F. Supp. 360, wherein the Court of Claims had found the present respondent was liable as employer for payment of taxes under the social security laws.

B. The Court of Appeals

The AFM and Local 802 appealed to the Court of Appeals.[4] On April 30, 1963, that court affirmed the judgment of the District Court.

The Court agreed, for the reasons stated by Judge Levet, with the finding that the single engagement field is an industry affecting commerce. The Court also agreed with the District Court that Cutler is the employer: He "has all effective control of the orchestra; he hires the sidemen, decides how much is to be charged for the performance and what share is to be allocated to each sideman, subject of course to union minimum charges. He also pays all the expenses of each performance, workmen's compensation, insurance premiums, withholding taxes and other taxes." App. A, p. 5a, *infra*. The Court expressly rejected the unions' reliance on the Form B Contract which designates the purchaser as the employer: "We find the designation in the Form B Contract to be a self-serving subterfuge which is not entitled to any weight." App. A, p. 5a, *infra*.

With respect to the union's construction of § 302, the Court of Appeals reached the same result as the District Court, but only by rejecting its uncontested factual findings and its legal reasoning [App. A, pp. 6a-7a, *infra*]:

> We do not agree that the leader's membership in the union immunizes him from the limitations

[4] The AFM and Local 802 simultaneously appealed the granting of a preliminary injunction in favor of the other plaintiffs-intervenors, as to whom no final judgment had been entered by the District Court. Certiorari is not sought from the Court of Appeals' affirmance of this order because of the discretionary nature of a preliminary injunction.

which § 302 imposes upon him because of his being an employer. He is not merely performing a ministerial task for the union, that is, collecting and paying over his and the sidemen's dues and exactions. *In fact, the leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share.* It is true that union regulations require the 1½ per cent to be deducted from the scale wage. But the actual amount paid to sidemen is often above scale, dependent entirely upon bargaining between the leader and each sideman.[7] The requirement that the leader turn over the tax is undoubtedly considered in arriving at the payment, obviating the need for any deduction.[8] *It is clear that the 10 per cent surcharge is an exaction from the leader's share. The amount is never deducted from the sidemen's wages.* In fact two percent of the scale wage is ultimately paid over to the sidemen.[9]

The unions argue that leaders may become members and pay union exactions even if they are self-employed because they are in wage or job competition, or economic interrelationship with other union members, see Los Angeles Meat and Provision Drivers Union v. United States, 371 U.S. 94, 103 (1962). This is true so far as the payment of dues is concerned. *But the leader is here required to pay further exactions on a basis entirely different from that of other union*

[7] There is no collective bargaining in this industry. [Court's footnote.]

[8] For example, if the union scale were $50, and the sidemen were paid the scale wage, $.75 would be deducted from his pay leaving $49.25. But if the leader agrees with the sideman that the latter is to "clear" $50, the tax is not deducted, but is paid by the leader. [Court's footnote.]

[9] See footnote 3. This is paid through the leader, as the union keeps little or no record of the musicians in whose behalf the leader pays the tax. [Court's footnote.]

members. We hold that the 10 percent surcharge payment violates § 302. [Emphasis supplied].

The unions filed a timely petition for rehearing addressed solely to the Court's disposition of this issue. The petition pointed out that the emphasized statements quoted above were squarely contrary to the findings of the District Court that the Local 802 tax and the travelling surcharge are imposed on the sideman's earnings, that the amounts are in fact deducted from the sideman's wages and finally, that the leader is collecting and paying the sideman's union obligations.[5] The unions also showed that the evidence cited by the District Court fully supported those findings, that these findings were undisputed by the respondent and that the Court of Appeals itself had stated that the facts were not contested. On May 17, 1963, the petition for rehearing was denied without comment.

REASONS FOR GRANTING THE WRIT

The judgment below presents a number of critical issues in the interpretation and application of § 302 of the Labor-Management Relations Act, as well as a matter of vital concern in the administration of the federal courts. Those issues are both novel and important and have a substantial impact upon the operation of all labor organizations. The reasons for the grant of certiorari to review and resolve those issues are most compelling.

Underlying all of these matters is the fact that § 302 of the Labor-Management Relations Act is a criminal

[5] The pertinent findings are set forth at n. 7, *infra*. And see App. B, pp. 16a-18a, *infra*.

statute carrying a penalty of up to one year's imprisonment and a fine of up to $10,000. While this is not a criminal case, the permanent injunction that issued was grounded on a finding of a violation of § 302 that would constitute a compelling legal precedent for any criminal prosecution.[6] The statutory conclusions reached in a civil case of this nature, as this Court has acknowledged, "would likewise apply to criminal cases." *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284, 296. Extreme care must, therefore be taken in the review of such a case as this, for there "cannot be one construction for [a declaratory] judgment and another for the Department of Justice." *Ibid.*

1. The Court of Appeals' Judgment Represents Such a Departure From the Usual and Accepted Course of Judicial Proceedings as to Warrant the Exercise of This Court's Supervisory Powers

The opinion and judgment of the Court of Appeals in this case represent a flagrant abuse of its appellate functions. By premising its decision upon critical factual assumptions directly contrary to the express and uncontested findings of the District Court, the Court of Appeals has altered the whole nature of the case, beclouded the problems of statutory interpretation, and deprived petitioners of their day in court. The violation of § 302 of the Labor-Management Relations Act which the District Court found was not the violation discovered by the Court of Appeals. So egregious is this shift in the application of a criminal

[6] Though the challenged by-laws had been openly enforced both before and after the enactment of § 302, there had been no prosecution or threat of prosecution prior to this litigation.

statute—a change that was not urged upon the Court of Appeals by any party—as to call for the exercise of this Court's supervisory power over the administration of justice in the lower federal courts.

Section 302 of the Labor Management Relations Act in essence makes it criminally unlawful, with certain exceptions, for an employer to pay or deliver any money "to any representative of any of his employees who are employed in an industry affecting commerce." As presented to the District Court, the basic question was whether § 302 is violated when a union requires all of its leader members, regardless of whether they are employers or employees, to transmit to the union certain work taxes due from the leader and his fellow working members. At the heart of that issue were uncontested findings of the District Court,[7] supported by voluminous evidence, to the effect that the taxes on the sidemen's work were due from the sidemen them-

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[7] With respect to the travelling surcharge, Judge Levet found (App. B, p. 16a, *infra*, emphasis supplied):

"17. Federation *members* who perform a 'miscellaneous out-of-town engagement' *are paid, but do not actually receive* in addition to their wages, an amount equal to 10% of the minimum wage established by the local in whose jurisdiction the engagement takes place. This additional amount is known as the 'traveling surcharge.' (Pl. Ex. 11, Art. 15; Art. 16, § 1A; Art. 17, § 1.)

18. The leader *does not actually turn over the additional 10% to his sidemen* because Federation By-laws provide that the local in whose jurisdiction such engagement is performed must collect the travelling surcharge from the leader, who is a member of the Federation, and transmit such collection to the Federation. (Pl. Ex. 11, Art. 15, § 7.) If the local fails to collect the surcharge from the leader who is a member of the Federation, such leader must transmit the surcharge directly to the Federation. (Pl. Ex. 11, Art. 15, § 8.)

19. The provisions of Federation's By-laws relating to the traveling surcharge are applicable *without regard to whether the member of the Federation who pays, collects or transmits*

selves and payable out of their own earnings. The violation of § 302, as determined by the District Court, was thus one in terms of an employer-member performing the ministerial task of collecting from his fellow-members and transmitting to his union *taxes imposed directly on the wages of all performing members.*

It was in those terms that the issue was presented to the Court of Appeals. No contention was made that the District Court had erred in any of its basic findings of fact. Indeed, the Court of Appeals itself acknowledged that "the facts upon which Judge Levet based the permanent injunction are not contested on this appeal." 316 F. 2d at 547; App. A, p. 2a, *infra.*

But then the Court of Appeals proceeded to ignore those uncontested findings and to hold that, "In fact, the leader is not really collecting the tax and surcharge from the sidemen at all; he is actually paying the union out of his own share," and that "the leader is here required to pay further exactions on a basis entirely

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the traveling surcharge may for some purposes be deemed to be an employer or an employee. (Pl. Ex. 11, Art. 15, §§ 1-3.)"

With respect to the Local 802 tax, Judge Levet found (App. B, pp. 17a-18a, *infra*, emphasis supplied):

"23. * * * The Membership Resolutions contained in said By-laws of Local 802 provide that the Local Tax is to be '*payable and collected from all members* * * * on all engagements based on the scale price therefor' (Pl. Ex. 12, p. 65; 29, p. 65) and the orchestra leader as a member of Local 802 is responsible for collecting and transmitting the Local Tax. (Pl. Ex. 12, p. 66; Arons, 442-443, 446, 512-514; Jaffee, 622-624)."

"25. The Local 802 tax is imposed solely on members of Local 802 and no person not a member of Local 802 is under any obligation to pay, collect, or transmit the tax to Local 802. The membership obligation which requires members of Local 802 to pay, collect or transmit said Local Tax is unrelated to a member's status as an employer or an employee. (Pl. Ex. 12, pp. 65-67)."

different from that of other union members." On those factual misstatements, contradicted by the findings of the District Court and the record evidence, the Court of Appeals drastically altered the entire nature of the statutory violation. The Court of Appeals affirmed the injunction as though the District Court had found a violation in the action of an employer paying money out of his own pocket, when in truth the District Court had found that the money came from the earnings of all the performers.

The distinction between these two factual premises is both obvious and substantial, vitally affecting the arguments and considerations relevant to the applicability of § 302. The essence of the holding of the Second Circuit is that a *special* tax levied *only* against employer-members is prohibited by Section 302. Petitioners never challenged or had occasion to challenge that self-evident proposition. Clearly, § 302 cannot be evaded by the transparent device of making employers members of the union and describing a special assessment against them as a membership obligation. That, however, was not the question raised by the undisputed facts nor decided by Judge Levet. What the petitioners have challenged and now challenge,[8] is the wooden application of § 302 so as to prevent employers, who are lawfully and properly members of the union, from meeting obligations equally required of non-employer members. Since the vast majority of leaders are not employers even under the District Court's criteria, and the obligation to transmit is imposed equally on all member leaders, it is plain that the transmittal is performed solely as a union obligation.

So drastic was the appellate court's transmutation of the theory of the statutory violation underlying the

[8] See pp. 17-20, *infra*.

injunction—a violation with criminal connotations—that a serious question of constitutional due process is raised. This Court has held in unequivocal terms that "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U.S. 196, 202. No less is that true where, as here, the validity of an injunction depends upon proof of a particular type of violation of a criminal statute. In that circumstance the enjoined individuals are entitled to have the violation supporting the injunction reviewed and assessed in light of "the case as it was tried and as the issues were determined in the trial court." *Ibid.* Here the Court of Appeals has "adjudicated rights without considering essential facts [as found by the District Court] in the light of the controlling law." Cf. *Maggio* v. *Zeitz*, 333 U.S. 56, 77.

Even in the setting of a case having no criminal implications, this Court has granted review on allegations that a Court of Appeals "had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence." *Letulle* v. *Scofield*, 308 U.S. 415, 416.[9] Such appellate unfairness is destructive not only of petitioners' right to due process but impedes their right to seek review of important

[9] See also, *General Utilities Co.* v. *Helvering*, 296 U.S. 200, 206-207, where this Court reversed a judgment of a court of appeals that had undertaken "to decide a question not properly raised" and that had "made an inference of fact directly in conflict with the stipulation of the parties and the findings, for which we think the record affords no support whatever."

issues of federal statutory law in the light of the relevant facts as fully developed below.

At the very least, the Court of Appeals misconceived its function under Rule 52(a), Federal Rules of Civil Procedure, by failing to accept the District Court's findings that the work taxes were imposed on the sidemen directly and were paid out of their wages; such findings could be ignored only if the appellate court had found (which it did not) that the findings were "clearly erroneous." This violation of Rule 52 (a) with respect to critical factual determinations would itself warrant review, particularly in the context of a case such as this, involving a violation of a criminal statute. Cf. *McAllister* v. *United States*, 348 U.S. 19, 20; *Dayton Rubber Co.* v. *Cordovan Associates, Inc.*, 364 U.S. 299.[10]

But where the infraction of Rule 52(a) results in a destruction of meaningful appeal rights and violently alters the nature of the statutory violation as found by the trial court, more serious problems of due process and fair judical procedure come into play. At that point, the supervisory jurisdiction of this Court must assert itself in order to preserve the orderly administration of justice in the federal courts. Here, as in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 403-404, "Both the standards and ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied." See

[10] The petition for certiorari in the *Dayton Rubber* case stated that "the sole question presented is whether the Court of Appeals erred in failing to apply to the finding above-mentioned [in the petition] the clearly erroneous test of Rule 52." Petition, p. 2, No. 324, October Term, 1960. This Court granted the petition and summarily vacated the judgment below for reconsideration in light of *Commissioner* v. *Duberstein*, 363 U.S. 278.

also *United States* v. *Johnston*, 268 U.S. 220, 227. Only the invocation of this Court's supervisory power can make certain that "the particular facts" to which § 302 has been applied have been properly discovered and assessed by the Court of Appeals in view of the statutory provisions.

2. On the Basis of the Uncontested Findings of Fact of the District Court, An Important and Novel Issue Is Raised as to the Application of § 302

The plenary nature of this Court's certiorari jurisdiction makes it possible for this Court to ignore the unwarranted factual assumptions which premised the Court of Appeals decision and to review that court's judgment solely as an affirmance of the District Court's injunction grounded upon the uncontested findings of fact. "In relation to the District Court's findings we stand in the same position as the Court of Appeals." *McAllister* v. *United States*, 348 U.S. 19, 20.

So viewed, the judgment below presents a far-reaching and unprecedented application of a criminal statute. As applied to the facts of this case, § 302 has been interpreted in a manner (1) contrary to the intent of Congress (2) grossly destructive of the legitimate interests of labor organizations and (3) inconsistent with the freedom of association guaranteed by the First Amendment. These consequences stem directly from a mechanistic reading of the statute that ignores the repeated admonitions of this Court that any provision of this statute must be read in the context of its object and policy. *Mastro Plastics Corp.* v. *Labor Board*, 350 U.S. 270, 285; *Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288.

The crux of this interpretation is that § 302 prohibits *any* payment by any employer to the representa-

tive of his employees even though (1) the employer is a union member, and (2) the payment represents a union obligation imposed equally on all members, be they employers or employees. As thus construed, the statute would ban not only the transmission of work dues involved in this case, but also ordinary dues payments by an employer-member. Petitioners urge that, properly interpreted, § 302 prohibits payments only when the employer acts *qua* employer, not when he acts as a union member.

As stated by this Court in *Arroyo* v. *United States*, 359 U.S. 419, 424-425, § 302 was designed "to deal with problems peculiar to collective bargaining" and was aimed "at practices which Congress considered inimical to the integrity of the collective bargaining process." These views were reaffirmed in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, in both the majority and dissenting opinions, *Id.* at 205 and 222. As Mr. Justice Brennan noted in his dissent, Congress was here concerned with such abuses of the collective bargaining process as "the payment by employers and the acceptance by employee representatives of unauthorized payments in the nature of bribes." 370 U.S. at 222. The collection and transmittal of union work taxes by a union member can hardly be considered "inimical to the integrity of the collective bargaining process" or "in the nature of bribes."

Nor is it conceivable that Congress, thoroughly familiar with the fact that many unions admit employers to membership,[11] intended to render criminal such nondiscriminatory membership obligations. Based on the commonplace that working employers are in economic

[11] See, e.g., § 8(a)(4)(A) of the Act, which clearly recognizes the right of employers voluntarily to join unions.

competition with ordinary workers, this Court has long and consistently recognized that unions "often have a legitimate interest in soliciting self-employed entrepreneurs as members." *Los Angeles Meat Drivers' Union* v. *United States*, 371 U.S. 94, 103. See also *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products*, 311 U.S. 91; *Bakery Drivers' Local* v. *Wohl*, 315 U.S. 769; *Teamsters Union* v. *Oliver*, 358 U.S. 283. And nowhere is such competition more obvious or more intense than in music.[12] If Cutler is an employer of musicians, it is only because he is a leader of musicians and he can only be such a leader if first and primarily he is and remains a musician. Unlike the employer of most craftsmen, a leader of musicians must possess and actively practice the skill of that craft. He has an obvious right to associate with fellow craftsmen in the same union. They have the equal right to associate with him. It is unthinkable that Congress intended to condition those equal rights on unequal obligations: that it criminally forbade an employer member from fulfilling the same union obligations required of any other member who works as a leader.[13]

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[12] Cutler himself, who plays an instrument while conducting, competes with all members of Local 802 who play the same instrument. Moreover, conducting is itself a working function. The District Court found (App. B, p. 14a, *infra*) that leaders who are unable to conduct engagements they have solicited appoint other musicians to perform as leaders, and further (R. 159b) that petitioner Local 802 has an exchange floor in which members frequently exchange engagements as sidemen and leaders.

[13] In the Taft-Hartley Act Congress expressly denied the assertion of any power to regulate union admission policies or the relations between unions and their members. See § 8(b)(1)(A); *Machinists* v. *Gonzales*, 356 U.S. 617, 620. Section 302 may not be read to intrude federal power into a subject which Congress reserved to the states. See *Arroyo* v. *United States*, 359 U.S. 419.

The assumption that Congress in § 302 meant to impose such discriminatory conditions upon the union obligations of employer members of the petitioning unions has several far-reaching consequences:

(1) The employer members are given a preferred status and a "free ride" with respect to union financial obligations;

(2) The membership practices of those many unions that do admit to membership employers who work at the trade are rendered criminally questionable;[14]

(3) Serious constitutional problems are raised relative to the freedom of association guaranteed by the First Amendment, for if the freedom of choosing one's union associates is premised upon a governmentally-imposed discrimination then that freedom has indeed been circumscribed. See *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 263; *Thomas* v. *Collins*, 323 U.S. 516.

In order to avoid such absurd and possibly unconstitutional results, the literal terms of § 302 must be deemed inapplicable to financial transfers arising out of union membership obligations as to which the "employer" status of the payor is irrelevant. The refusal of the courts below to accomodate § 302 to the "legitimate interest" of the petitioning unions thus warrants the fullest consideration by this Court.

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[14] Employers are union members and work at the trade as truckers, printers, plumbers, barbers, and in countless other industries.

3. The Determination That Respondent Was an "Employer" for Purposes of the Labor Management Relations Act is in Conflict With the Uniform Course of Decisions in Other Courts of Appeals

The conclusion of the Court of Appeals below that respondent is an "employer" under the Act was predicated on an error of law which would alone require review because it is in conflict with the uniform course of decision in the Courts of Appeals.

Respondent as leader used the standard Form B Contract required by Union regulations[15] which provides as follows:

> "The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance."

This contract clearly gives to the purchaser of the music the right of control over the performance. The holding of the courts below that the leader is the employer despite the fact that the purchaser of the music is vested with the right of control is contrary to the deliberate choice of Congress, countless decisions of the courts of appeals, and the decisions of the National Labor Relations Board on this very question.

Ever since the enactment of the Labor Management Relations Act, the unvarying rule applied by the Board, and, in turn, approved by the courts, has been that "the test for determining whether the employer-em-

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[15] Article 13, Section 33 of the Federation By-laws provides: "Members of the A.F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A.F. of M. Penalty: Fine of not less than $100.00."

ployee relationship exists is right to control, not the actual exercise of control." *Labor Board* v. *Nu-Car Carriers*, 189 F. 2d 756, 759 (C.A. 3), *cert. denied*, 342 U.S. 919. Accord: *Labor Board* v. *Steinberg*, 182 F. 2d 850 (C.A. 5); *United Ins. Co.* v. *Labor Board*, 304 F. 2d 86 (C.A. 7); *Labor Board* v. *Keystone Floors, Inc.*, 306 F. 2d 560 (C.A. 3). Moreover, the Board, in a series of decisions involving musicians, has held that by virtue of the Form B Contract the purchaser of the music is the employer. *Independent Motion Picture Producers' Assoc.*, 123 NLRB 1942; *Edward Small Productions, Inc.*, 127 NLRB 283; *Batjac Enterprises, Inc.*, 126 NLRB 1281; *The Alamo Co.*, 129 NLRB 1093.

The courts below relied on *Carroll* v. *AFM*, 295 F. 2d 484 (C.A. 2), which in turn had cited *Cutler* v. *United States*, 180 F. Supp. 360 (Ct. Cl.). In the latter case the Court held that the present respondent was liable as employer for social security payments on behalf of the musicians notwithstanding his use of the Form B Contract. The Court of Claims based its decision on the controlling precedent of *Bartels* v. *Birmingham*, 332 U.S. 126, 130, where it was held "that economic reality rather than right of control is the test which determines liability for employment taxes under the Social Security Act." But the economic reality test, whatever its validity for purposes of the Social Security Act,[16] was expressly repudiated for purposes of the Labor Management Relations Act when that Act was amended by Congress in 1947. 1 *Legislative History of the Labor-Management Relations Act, 1947*, pp. 536-537 (G.P.O., 1948); House Con-

[16] The terms "employer" and "employee" lack a fixed content and vary according to their legal context. See *United States* v. *American Trucking Assoc.*, 310 U.S. 534, 545, n. 29.

ference Rept. No. 510, on H.R. 3020, 80th Cong., 1st Sess., pp. 32-33. In 1959, when Congress amended § 302, this limited definition of "employer" for purposes of § 302 was deliberately retained, although a broader definition was adopted for other purposes. See Labor-Management Reporting and Disclosure Act of 1959, §§ 3, 3(e) and 505; 73 Stat. 520, 537.

The Court of Appeals said (App. A, p. 5a, *infra*): "We find the designation in the Form B Contract to be a self-serving subterfuge[17] which is not entitled to any weight." The District Court had made no findings to support this assertion nor is there any evidence in the record that Form B does not give or was not intended to give the right of control to the purchaser of the music. On the contrary, as the record makes abundantly clear, there are many purchasers of music who actively exercise this right of control (e.g., *Carroll* R. 328a-335a).

The decision below reopens an issue which Congress thought it had closed in adopting the right-of-control test in 1947 and which it kept closed when it consciously retained that test for purposes of § 302 in the 1959 amendments. Hitherto, the Courts of Appeals as well as the Labor Board have consistently followed this standard. Identification of the "employer" is critical in many contexts under the Labor-Management Relations Act. The decision below thus introduces confusion and uncertainty into federal labor law and is in such sharp conflict with the decisions of other circuits as to call for review by this Court.

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[17] This unwarranted and cavalier description ignores the fact that the Form B contract was adopted long before the enactment of § 302 and ". . . with the approval of the Commissioner of Internal Revenue . . ." *Bartels* v. *Birmingham*, *supra*, at p. 132.

4. The Decision Below That the "Single Engagement Field" Is "An Industry Affecting Commerce" Constitutes An Unwarranted Extension of the Federal Commerce Power in Direct Conflict With the Principles Established By This Court

The decision below that the respondent Cutler, as an orchestra leader who occasionally plays engagements outside the State of New York, is in an industry affecting commerce within the scope of the Labor-Management Relations Act directly conflicts with the basic principles recognized by this Court in defining and applying the Commerce Clause of the Constitution.

The Act, of course, represents an exercise by Congress of its full constitutional power over interstate commerce. *Labor Board* v. *Fainblatt*, 306 U.S. 601, 607. But it is no less obvious that there are ultimate and outer limits to the constitutional concept of interstate commerce. As interpreted by this Court the Commerce Clause does not extend to those transactions between states which are so "few, sporadic and incidental," *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339, or which are "so insignificant," *Industrial Association* v. *United States*, 268 U.S. 64, 84, as to justify "that to which courts would apply the maxim de minimis," *Labor Board* v. *Fainblatt*, *supra*, 607.[18]

These necessary limitations on the scope of the federal commerce power reflect the fact that even the "interpenetrations of modern society have not wiped out state lines" and that the Commerce Clause "can-

[18] See also *Second Employers' Liability Cases*, 223 U.S. 1, 47 (the Commerce Clause "does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.").

not justify absorption of legislative power by the United States over every activity." *Polish National Alliance* v. *Labor Board*, 322 U.S. 643, 650. It is precisely because the decision below totally ignores those basic truths by extending the commerce power to a level far below the de minimis limitations established by this Court that review of this case becomes essential.

The District Court findings upon which rests the invocation of the federal commerce power in this case were but two in number:

(1) The finding that the regulations and by-laws of the Federation and Local 802 contemplate travel by orchestras in the single engagement field and demonstrate that these unions "represent members (both leaders and sidemen) in the single engagement field whose engagements require a constant continuous stream of trade and commerce between the States of the United States." App. B, pp. 12a-13a, *infra*.[19]

(2) The finding that respondent Cutler "fulfills engagements outside the State of New York, in which he usually operates and in which his principal office

[19] The by-law provisions said to demonstrate such "stream of trade or commerce between the States" related to the 10% traveling surcharge, traveling members' obligations, mileage charges, steamship performances, "etc." R. 195b. But those provisions, as set forth by the District Court, R. 193b-194b, make reference only to "traveling" or "out-of-town" engagements and make no specific mention of "interstate" engagements. These provisions do not relate to the crossing of state lines but rather to local union jurisdictional lines (and there are usually several locals within one state) or are based strictly on miles traveled, which may be within a single union jurisdiction and within one state. Thus, for example, the mileage provisions on which Judge Levet expressly relied in making the identical commerce finding in granting the preliminary injunction (R. 161b) apply to all distant engagements without regard to whether they are performed in or out of New York State.

is located," App. B, p. 13a, *infra*, and that his business involves, in addition to actual leading of his orchestra, "the negotiating and signing of engagement contracts and the transporting of sidemen, musical instruments and other required materials between states of the United States," App. B, p. 24a, *infra*.

Such findings only add up to the truisms that some musicians negotiate and perform engagements in more states than one, and that the petitioning unions have rules pertaining to traveling members. There is not the slightest indication or finding that these rules were designed to reflect "a constant continuous stream" of interstate traveling engagements or that respondent Cutler himself did anything more substantial than negotiate and fulfill some engagements outside the State of New York.[20] To infer from this record that the single engagement field is an industry affecting commerce within the scope of the Commerce Clause is to premise a constitutional conclusion upon a shadow of a shade of the requisite findings. For aught that appears in this record, the federal commerce power has been asserted on nothing more than the sporadic, the incidental and the insignificant—factors which are beyond the pale of the Commerce Clause.

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[20] That "sporadic and incidental" interstate mailings do not amount to interstate commerce was decided in *United States* v. *Oregon Medical Society*, 343 U.S. 326, 338-339. And the mere movement of the leader and the other musicians across state lines on an unspecified number of occasions no more partakes of interstate commerce than the interstate movement of patients which was held insufficient to bring the Sherman Act into play in *Spears Free Clinic* v. *Cleere*, 197 F.2d 125 (C.A. 10); *Riggall* v. *Washington County Medical Society*, 249 F. 2d 266 (C.A. 8), cert. denied, 355 U.S. 954; and *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167 (C.A. 8), cert. denied, 361 U.S. 884.

The fact that Cutler negotiates and fulfills an unspecified number of engagements outside the State of New York is not the equivalent of the extensive activities of an interstate nature which alone justified the application of the Sherman Act in *United States* v. *Shubert*, 348 U.S. 222, and *United States* v. *International Boxing Club*, 348 U.S. 236, cases which the courts below relied upon in the instant case. Both those decisions involved local affairs—the showing of a motion picture and a boxing match—similar in nature to the local affair in this proceeding, the performance of a single musical engagement. But it required a four-page appendix in the *Shubert* case (348 U.S. at 231-235) and a three-page appendix in the *International Boxing* case (348 U.S. at 245-248) to detail the interstate activities and implications arising out of the businesses of promoting the respective local affairs. And the Court noted in the *International Boxing* case, 348 U.S. at 241, that it was there enough "to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television and motion picture rights."

In sharp contrast, Cutler's business with respect to local single musical engagements has not been found to have any appreciable interstate characteristics. The engagement itself is necessarily local; and interstate commerce has been found only by virtue of some indecisive by-laws and an unspecified number of interstate transactions by one individual.[21] The de minimis rule recognized by this Court forbids any conclusion

[21] There is, of course, no claim or finding that the local engagements had any such economic interrelationships or any such impact upon interstate commerce as to warrant the application of the

that an "industry affecting commerce" has been established for purposes of the Commerce Clause.

Only by indulging in "scholastic reasoning," against which this Court admonished in *Polish National Alliance*, 322 U.S. at 650, can such sporadic and indefinite interstate promotional activities be said to sustain the exercise of the federal commerce power so as to regulate the performance of music at weddings, confirmations and dances. For once it is acknowledged that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business," *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 231, the insubstantiality of grounding the exercise of federal power on the trivial interstate factors in this case become clear. Because the court below so completely ignored the practical concepts of interstate commerce, because it permitted an unwarranted extension of federal power over essentially local affairs, and because it flouted the de minimis principle embedded in the Commerce Clause, review by this Court becomes appropriate.

The Commerce Clause was never designed to subject to federal control every profession or trade whose operation involves sporadic and incidental interstate transactions. The lawyer, the doctor, the musician and the

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Commerce Clause under the principles recognized in *Wickard* v. *Filburn*, 317 U.S. 111.

There is no finding, and it has not been contended, that the particular Federation regulations which deal with travel place such a burden on interstate commerce that they would be subject to federal regulation. Even if such an argument were to be made and sustained, it could not justify federal regulation of local union taxes such as the 1½% tax whose operation was also enjoined by the court below, since that tax by definition applies only to members of Local 802 performing within that Local's jurisdiction.

teacher—absent some substantial interstate promotional activities—remain free of federal control in their incidental and sporadic travel and communication across state lines in furtherance of their professions. The inroad which the decision below has made upon that vital proposition underlying our federal system urgently calls for review and redress by this Court.

CONCLUSION

By reason of the foregoing, this petition for certiorari should be granted.

Respectfully submitted,

HENRY KAISER
EUGENE GRESSMAN
GEORGE KAUFMANN
RONALD ROSENBERG
1730 K Street, N.W.
Washington 6, D. C.
Counsel for Petitioners

Of Counsel:

EMANUEL DANNETT
DAVID I. ASHE
JEROME H. ADLER

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